No. 03-72384

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARJORIE KONDA LOLONG,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S PETITION FOR REHEARING EN BANC

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
Deputy Director

FRANCIS W. FRASER
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0193

Attorneys for Respondent

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INTRODUCTION

In contravention of agency legislative regulations, and in direct conflict with a decision of the Third Circuit, a panel of this Court drastically expanded asylum eligibility, opening the floodgates to thousands - if not millions - of otherwise ineligible aliens. Attorney General Alberto R. Gonzales respectfully petitions this Court for rehearing *en banc* of its March 18, 2005, decision in this case. *See Lolong v. Gonzales*, 400 F.3d 1215 (9th Cir. 2005).

The Immigration and Nationality Act ("INA") grants broad rulemaking authority to the Secretary of Homeland Security or the Attorney General to establish the requirements and procedures for both applying for asylum and for agency consideration of asylum applications. 8 U.S.C. § 1158(b)(1), (d)(1). That broad rulemaking authority has been implemented to provide that there are two - - and only two - - ways in which an asylum applicant can establish a well-founded fear of persecution. First, the alien can show that he would be "singled out individually" for persecution, and second, he can establish a "pattern or practice" of persecution. 8 C.F.R. § 208.13(b)(2)(iii)(2000). According to *Lolong*, by contrast, there is a third means of qualifying for asylum - mere membership in a "disfavored group." This judicially manufactured test, which bypasses the need to establish actual individual risk absent a pattern or practice of persecution, was wrong when

it was first conceived in *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994), and it is wrong today. The Court should reject it *en banc*.

Indeed, even if there were some merit to an alternative test that used group membership as a basis to ratchet down an alien's burden of proof, the Court should still rehear *Lolong* en banc. As applied here, the "disfavored group" test is remarkably expansive and inconsistent with basic principles of asylum jurisprudence. First, the alleged group need not be persecuted; mere "disfavored" status or mistreatment is sufficient. Second, the alien need not show *any* individualized risk. Because mere membership in a subgroup automatically qualifies an alien for asylum, his burden of proof is reduced to nothing.

Accordingly, there are three reasons why this case warrants rehearing *en banc*.

First, the "disfavored group" test reflects the Court's failure to accord controlling weight to the agency's legislative regulation and the substitution of its own interpretation of the well-founded fear standard. The Court failed to accord the exceedingly deferential arbitrary and capricious standard of review" which controls when, as here, Congress has granted broad rulemaking authority to an agency to implement statutory provisions. The test thus conflicts with the decisions of the Supreme Court in *Bowen v. Yuckert*, 482 U.S. 137, 145 (1987);

INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); and *Heckler v. Campbell*, 461 U.S. 458, 466 (1983).

Second, the "disfavored group" test is in sharp tension with controlling precedent from this Circuit holding that evaluation of a claim of persecution is a "heavily fact-dependent issue." *Mansour v. Ashcroft*, 390 F.3d 667, 672 (9th Cir. 2004); *Mihalev v. Ashcroft*, 388 F.3d 722, 728 (9th Cir. 2004). *Lolong*, by contrast, seemingly renders all Sino-Indonesian women and Christians automatically eligible for asylum irrespective of their individualized fear. The need to secure uniformity among the Court's decisions is further demonstrated by recent unpublished decisions of this Court which do not apply the "disfavored group" test in assessing claims by Sino-Indonesians.

Third, the Court's application of the "disfavored group" test is in direct conflict with the decision of the Third Circuit in *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005)(petition for rehearing *en banc* denied)(rejecting "disfavored group" analysis).

STATEMENT

1. Lolong is an ethnic Chinese Indonesian, and a Christian woman. A.R. 242, 245. Except for several return visits to Indonesia, Lolong has lived in the United States since 1990. A.R. 252-54. As a child, she was improperly touched on the arms and verbally accosted by peddlers and magazine sellers in Jakarta. A.R. 247. Her father has had no problems since 1965 when he was arrested and detained during the "Communist arrival" in Indonesia. A.R. 243-44, 246. Her mother has never been physically harmed. Lolong's family has generally lived in Indonesia without serious incident. Although her uncle was severely beaten during a robbery in 1999, A.R. 266, her immediate and extended family continues to reside unharmed in Indonesia. A.R. 252, 293-94, 311. Lolong claimed that a female friend had been raped during the May 1998 riots. A.R. 259-60.

2. The immigration judge found that Lolong had a well-founded fear of future persecution based on her Chinese ethnicity and religion (but not gender), and she granted asylum on that basis. A.R. 76. The immigration judge relied heavily on the testimony of an expert witness testimony that: continuation of the pattern of violence against ethnic Chinese may depend on the future instability of the Indonesian economy and government; the rise of Muslim fundamentalism poses a significant threat to Chinese Christians; and the military has abetted the

violence. A.R. 72-74. She concluded that Lolong's fear was objectively reasonable due to the instability of the current government, even though she also found that "many persons similarly situated to [Lolong], that is, Chinese Christian women, have elected to remain in Indonesia. The Court believes that reasonable persons could elect to make different decisions . . . ." A.R. 77.

The Board of Immigration Appeals ("BIA") sustained the appeal of the INS based on the commitment of the Indonesian government to protect freedom of religion. A.R. 2. It found that the continuation of some attacks on Chinese or Christians does not support a reasonable possibility that Lolong would be persecuted if she returned in the absence of evidence that the government is unwilling or unable to control the perpetrators. A.R. 3.

3. A panel of this Court found that Lolong's membership in a significantly disfavored group, and in two sub-groups that are at greater risk of persecution (Christians and women), demonstrates that she faces a particularized risk of persecution. *Lolong*, 400 F.3d at 1225. It found that Lolong's fear of future persecution was well-founded because the Indonesian government is unwilling or unable to control this persecution. *Ibid.* The Court noted that it already determined in *Sael v. Ashcroft*, 386 F.3d 922, 929 (9th Cir. 2004) that ethnic Chinese are a "significantly disfavored" group in Indonesia based on the "cycle of

waxing and waning violence" which periodically returns during times of economic or political unrest. *Id.* at 1217. The Court then applied "disfavored group" analysis and concluded that "the level of individualized targeting that [Lolong] must show is inversely related to the degree of persecution directed toward that group generally." *Id.* at 1219. According to the Court, a member of a disfavored group which is not the subject of a pattern or practice of persecution must also prove that she is "more likely to be targeted" as a member of that group but, because ethnic Chinese are "significantly disfavored," the level of particularized risk that must be shown is "comparatively low." *Ibid.* The Court then found that the new evidence presented by Lolong "further lowers the level of particularized risk that Lolong must demonstrate . . . ." *Id.* at 1220.

The Court determined that Lolong met her "comparatively low" burden simply on the basis of her membership in two sub-groups that face a heightened risk of "mistreatment": Christians and women. *Id.* at 1221. Although Lolong faces no personalized risk at all, the Court found that the increased violence against ethnic Chinese Christians is tied to the holy war against them called for by the growing militant Islamic movement. It also found that the pattern of violence against women occurs during periods of ethnic and religious violence (evidenced

by the "systematic" raping of dozens and possibly hundreds of women during the May 1998 riots).

ARGUMENT

1. The Court "misconceived the nature of its role in reviewing the regulation[] at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984). Congress has conferred on the Attorney General the authority to administer the INA, including exceptionally broad authority to fill gaps left by Congress in the statutory program and prescribe asylum eligibility standards. In the exercise of that delegated authority, the Attorney General promulgated a regulation which creates the exclusive framework for assessing whether an asylum applicant has met her burden of proving a well-founded fear of future persecution. This legislative regulation should be given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844 (footnote omitted). Rather than apply this extremely deferential standard, the Court "substitute[d] its own construction," *ibid.*, and created an alternative, open-ended "disfavored group" test for assessing a well-founded fear of persecution. The direct conflict with Supreme Court and Circuit precedent warrants rehearing *en banc*.

a. The Attorney General is assigned the general responsibility to "establish such regulations as he deems necessary for carrying out his authority" under the INA. 8 U.S.C. § 1103(a)(3). In particular, the asylum statute directs the Attorney General (and now the Secretary of Homeland Security[1]) to "establish a procedure for the consideration of asylum applications," and authorizes him to grant asylum to an alien who has applied for asylum "in accordance with the requirements and procedures established by the [Secretary or Attorney General] under this section . . . ." 8 U.S.C. § 1158(b)(1), (d)(1). 8 C.F.R. § 208.13(b)(2)(iii) reflects the agencies' exercise of Congress's "express delegation of authority to . . . elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 844.

The Supreme Court has held in the analogous Social Security context that where "the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation, our review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." *Heckler v. Campbell*, 461 U.S. 458, 466 (1983); *Bowen v. Yuckert*, 482 U.S. 137, 145 (1987). The Supreme Court has recognized that the exceedingly deferential standard applied when reviewing an agency's "legislative regulations" (which are entitled to "controlling weight") is

[1] REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101, 119 Stat. 231 (2005).

even more generous than the normal deference shown a "department's construction of a statutory scheme it is entrusted to administer" (which is entitled to "considerable weight"). *Chevron*, 467 U.S. at 844.

The Supreme Court has reminded this Court that "principles of *Chevron* deference are applicable to th[e] statutory scheme" of the INA. *INS v. Aguirre-Aguirre*, 536 U.S. 415, 424 (1999)(bracketed material omitted). The Supreme Court explained that "judicial deference to the Executive Branch is especially appropriate in the immigration context" because of the foreign policy implications of immigration law. *Id.* at 425.

b. The term "well-founded fear of persecution" is not defined by the INA. In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court suggested that the "well-founded fear" standard required an objectively "reasonable possibility" of persecution, but it declined to attempt a detailed definition. The Supreme Court then articulated the role of the agency in interpreting and applying the standard and the role of the courts in deferring to that interpretation:

> There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. *In that process of filling "any gap left, implicitly or explicitly, by Congress," the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.*

Id. at 448 (emphasis added)(quoting *Chevron,* 467 U.S. at 843). It was with this background in mind that the former Immigration and Naturalization Service provided the framework for "filling the gaps" in the statute and promulgated the predecessor to 8 C.F.R. § 208.13(b)(2)(iii) using identical language.

8 C.F.R. § 208.13(b)(2)(iii) (emphasis added) provides that:

> [t]he asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be *singled out individually* for persecution if:
>
> (A) The applicant establishes that there is a *pattern or practice* in his or her country of nationality . . . of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

Since the decision in this case, the BIA on May 9, 2005, issued a published decision in *Matter of A-M-*, 23 I. & N. Dec. 737 (BIA 2005) in which it stood behind and applied the regulation and upheld the denial of withholding of removal to an ethnic Chinese Christian man from Indonesia.[2] The BIA concluded that the

[2] This Court "owe[s] agency interpretations of their own regulations substantial deference." *Lal v. INS*, 255 F.3d 998, 1004 (9th Cir. 2001); *see also Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1944) (requiring deference to agency application of its regulations)

threat to life or freedom required for withholding "may be met by showing *either* (1) that he would likely be singled out individually for persecution . . ., *or* (2) that there is a pattern or practice of persecution . . . ." *Id.* at 740 (emphasis added, citing 8 C.F.R. § 208.16(b)(2)).[3] The BIA cited and relied upon the Third Circuit's decision in *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005). The BIA acknowledged this Court's "disfavored group" analysis, *id.* at 741 n.5, but it did not apply the "disfavored group" test. *Matter of A-M-* represents the BIA's clear statement that there is no room for a "disfavored group" test under parallel regulatory language.

c. In sum, Congress has expressly delegated to the Attorney General exceptionally broad authority to "fill gaps" in the asylum statute by promulgating legislative regulations which prescribe standards of eligibility. 8 C.F.R. § 208.13(b)(2)(iii) is such a legislative regulation, and it is entitled to be given controlling weight unless it is arbitrary, capricious, or contrary to statute. The Court's development of the "disfavored group" test developed in *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994), and its application in *Sael v. Ashcroft*, 386 F.3d 922, 929 (9th Cir. 2004) and again here, is in direct conflict with this the regulatory

[3] The provisions of this withholding of removal regulation are virtually identical to 8 C.F.R. § 208.13(b)(2)(iii).

framework, and it contravenes the Supreme Court's teaching of deference to the agency's broad rulemaking authority.[4]

2. Rehearing *en banc* is warranted to ensure uniformity in the Court's decisions.

a. The application of the "disfavored group" test has not been uniform. In seven unpublished decisions issued since *Sael*, the Court denied the petition for review brought by ethnic Chinese Indonesians without applying the disfavored group test.[5] *See Chandra v. Gonzales*, No. 03-73879, 2005 WL 415118 (9th Cir. Febr. 22, 2005); *Tombuku v. Gonzales*, No. 03-70808, 2005 WL 352528 (9th Cir. Febr. 14, 2005); *Lu v. Ashcroft*, No. 04-70802, 2005 WL 89382 (9th Cir. Jan. 18, 2005); *Lie v. Ashcroft*, No. 03-73603, 2005 WL 89398 (9th Cir. Jan. 18, 2005); *Tedja v. Ashcroft*, No. 03-73316, 2005 WL 91611 (9th Cir. Jan. 18, 2005); *Tengker v. Ashcroft*, No. 04-70174, 2005 WL 81565 (9th Cir. Jan. 13, 2005); *Widjaja v. Ashcroft*, No. 03-72198, 2004 WL 2453327 (9th Cir. Nov. 1, 2004). Several of

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[4] The Court should not have reached the disfavored group issue, because it was not considered and addressed in the agency below. If the *en banc* Court decides to reach the issue, it should remand to the agency to address the issue in the first instance instead of deciding the issue itself. *See INS v. Ventura*, 537 U.S. 12 (2002).

[5] *See* Ninth Circuit Rule 36-3(b)(iii)(permitting the citations of unpublished decisions to "demonstrate the existence of a conflict.").

these cases applied strict regulatory pattern or practice analysis: *Lu*, *Lie*, and *Tedja*.[6] Also, the Court has directed the government to respond to a *Sael*-based petition for rehearing based in four cases. *See Ng v. Gonzales*, No. 03-72596, 2005 WL 375737 (9th Cir. Febr. 17, 2005); *Lieman v. Ashcroft*, No. 03-71840, 2004 WL 2203939 (9th Cir. Sept. 27, 2004); *Gunawan v. Gonzales*, No. 03-71861, 2004 WL 2203940 (9th Cir. Sept. 27, 2004); and *Halim v. Ashcroft*, No. 03-70133, 2004 WL 2030115 (9th Cir. Sept. 9, 2004).

b. In *Mansour*, 390 F.3d at 673, the panel majority implicitly declined the dissent's invitation to apply disfavored group analysis in an asylum case brought by Coptic Christian Egyptians.

c. *Lolong* directly conflicts with this Court's previous treatment of persecution as a "heavily fact-dependent issue." *Mansour*, 390 F.3d at 672; *Mihalev v. Ashcroft*, 388 F.3d 722, 728 (9th Cir. 2004)("[o]ur inquiry on the question of what kind of mistreatment qualifies as persecution is fact-intensive. As a result, our decisions often seem to point in opposite directions on relatively similar facts."). *Lolong* abandons this tradition by eliminating *Sael's* "case-specific examination of [the] evidence of 'individualized risk.'" *Sael*, 386 F.3d at 927.

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[6] Several of these cases involved only applications for withholding of removal but, as stated above, the pertinent regulation is virtually identical to the well-founded fear regulation. *See* 8 C.F.R. § 208.16(b)(2)(2000).

None of the record evidence pertaining to conditions in Indonesia reviewed by the Court, 400 F.3d 1219-22, relates personally to Lolong. The Court noted that Lolong had two friends who were attacked and raped, that her father was arrested and beaten in the 1960s, and that an uncle was severely beaten during a robbery in 1999. *Id.* at 1223. It ignored the fact that other friends and the closest of her relatives have lived and continue to live in Indonesia without notable incident, and that Lolong returned a number of times without incident.

3. Rehearing *en banc* is warranted because the "disfavored group" test is in direct conflict with the decision of the Third Circuit in *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005). Lie too is an ethnic Chinese Indonesian, a Christian and a woman. The Third Circuit articulated the requirements of 8 C.F.R. § 208.13(b)(2)(iii) in "either/or" terms, and "agree[d] with the BIA, that Lie has failed to establish either that she faces an individualized risk of persecution or that there is a 'pattern or practice' of persecution of Chinese Christians in Indonesia." *Lie*, 396 F.3d at 536-37. Based on a factual record similar to Lolong's, the Third Circuit found that "there is little evidence that Lie would face an individualized risk of persecution," and that the persistent anti-Chinese violence was not "systemic, pervasive, or organized" and therefore did not amount to a "pattern or practice." *Ibid.* In a footnote, the Third Circuit noted this Court's "disfavored

group" test, but concluded that "[w]e disagree with the Ninth Circuit's use of a lower standard for individualized fear absent a 'pattern or practice' of persecution and, similarly, we reject the establishment of a 'disfavored group' category." *Id.* at 538 n.4. *See also Zhao v. Gonzales*, 404 F.3d 295, 307 (5th Cir. 2005)(holding that "[t]here are therefore two different ways" to establish a well-founded fear.).

4. Rehearing *en banc* is warranted because this case involves a question of exceptional importance: the "disfavored group" test empties the existing regulation of practical force and effect and will dramatically impact on the administration of the asylum regulatory regime.

a. 8 C.F.R. § 208.13(b)(2)(iii) distinguishes persecution of a group, which it addresses in the pattern or practice component, from persecution of an individual, which it addresses in the singled out component. Noting that a "pattern or practice" requires persecution which is systematic, *Kotasz*, 31 F.3d at 852, the Court developed the "disfavored group" test to address so-called "non-pattern or practice cases" and lower the standard of eligibility. Under this test "disfavored groups are not threatened by systematic persecution of the group's entire membership . . . ," *id.* at 853, nor are members required to show that they would be singled out. The Court's new open-ended standard nullifies both the concept of persecution and the likelihood of its being encountered in the future.

b. Even if there were merit to an alternative test that used group membership to ratchet down the alien's burden of proof, the decision in this case still warrants *en banc* review. First of all, the "persecution" element has disappeared from the well-founded fear equation because a person who has demonstrated neither the pattern or practice nor the singling out elements can nevertheless establish asylum eligibility by showing that his group is "disfavored" or "mistreated." Second, the *Lolong* panel eliminated entirely the requirement that an alien show actual individualized risk absent a pattern or practice. According to the panel, mere membership in a subgroup within a disfavored group is sufficient.

c. There are no apparent limitations to the possible application of the "disfavored group" test's diluted standard of eligibility. The overwhelming majority of asylum applicants claim that they have a well-founded fear of persecution on the basis of a shared protected characteristic, rather than one which is truly unique to them. Thus, each applicant for asylum is, by definition, a member of at least one "disfavored group."

5. In *Molina-Camacho v. Ashcroft*, 393 F.3d 937, 941 (9th Cir. 2004) the Court held that no order of removal existed, and hence the Court lacked jurisdiction, where the immigration judge found removability and granted asylum, but the BIA reversed as to asylum and ordered removal. The government believes

that *Molina-Camacho* was incorrectly decided. The INA unambiguously provides that "'order of deportation' means the order of the special inquiry officer . . . *concluding that the alien is deportable* or ordering deportation." 8 U.S.C. § 1101(a)(47) (emphasis added).[7] The government filed a petition for panel rehearing in *Molina-Comacho*, but the petition was dismissed on jurisdictional grounds after the district court remanded the case to the Board.

In this case, as in *Molina-Camacho*, the immigration judge found that the alien is deportable and granted asylum, and the Board reversed the grant of asylum. Thus, there is an enforceable order of deportation in this case and the Court correctly determined that it has jurisdiction. *See Lolong*, 400 F.3d at 1218. In any event, if the Court determines to follow *Molina-Camacho*, it should vacate the decision in this case for lack of jurisdiction.[8] However, if the Court agrees with the government that it has jurisdiction in this case, it should grant *en banc* review and reject the "disfavored group" test.

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[7] *Molina-Camacho* clarified that "order of deportation" in the statute now applies to "orders of removal" such as the one in this case.

[8] The Court's decision in *Sael* should be vacated for the same reason. *See Rivers v. Roadway Express*, 511 U.S. 298, 311-12 (1994)("[J]udicial decisions operate retrospectively . . . . A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.") (footnote omitted).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing *en banc* in this case.

Respectfully submitted,
PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
Deputy Director

FRANCIS W. FRASER
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

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PETITIONER'S OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING EN BANC

Robert B. Jobe
LAW OFFICE OF ROBERT B. JOBE
550 Kearny, Suite 150
San Francisco, CA 94108
Tel. (415) 956-5513

Attorney for Petitioner

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INTRODUCTION

En banc review is unwarranted in this case, which involves a straightforward application of *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994), and *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004), to the undisputed facts of this case. Although the Third Circuit has rejected *Kotasz*' analytical framework, it is the only circuit to do so. By contrast, the Fourth and Eighth Circuits have expressly embraced *Kotasz* and its recognition that "the more egregious the showing of group persecution - the greater the risk to all members of the group - the less evidence of individualized persecution must be adduced." *Kotasz*, 31 F.3d at 853; *see Chen v. INS*, 195 F.3d 198 (4th Cir. 1999); *Makonnen v. INS*, 44 F.3d 1378 (8th Cir. 1995). Moreover, it is disingenuous for the respondent to suggest that the Court's decision in *Lolong* opened "the floodgates to thousands - if not millions - of otherwise inadmissible aliens." *Respondent's Petition* at 1. After all, when the Fifth Circuit recently held that Indonesian Christians face a pattern or practice of persecution and that they need not, therefore, demonstrate that they would be singled out for persecution, the Government did not even seek rehearing. *Eduard v. Ashcroft*, 379 F.3d 182 (5th Cir. 2004).

STATEMENT OF THE FACTS

"During periods of heightened social, economic, or political unrest [in

Indonesia], anti-Chinese sentiment erupts into wide-scale, severe violence, but even during periods of 'relative calm,' ethnic Chinese-Indonesians suffer discrimination and harassment, as well as violent attacks."[1] *Lolong v. Gonzales*, 400 F.3d 1215, 1217 (9th Cir. 2005)(internal citation omitted). This violence is attributable to "continuing official discrimination and a centuries-old pattern" of scapegoating the Chinese minority, and is linked to a "particularized pattern of violence against ethnic Chinese Christians."[2] *Id.* at 1217, 1220.

Because of their ethnicity and religion, Ms. Lolong's family and friends have

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[1] In the 1960's, "near genocidal" pogroms lead to the deaths of hundreds of thousands of ethnic Chinese Indonesians. *Sael*, 386 F.3d at 925; *see also*, A.R. 799 (*Sydney Morning Herald*), 974 (*BBC News*). In 1998, Indonesian rioters looted and burned "thousands" of stores and homes owned by ethnic Chinese, murdered more than 1000 ethnic Chinese Indonesians, and systematically raped dozens, if not hundreds, of Chinese women. A.R. 662 (*Country Report*), 945 (*Cnn.com*), 1080-81 (*Agence France Presse*), 1163 (*Orlando Sentinel*); *see also*, *Lolong*, 400 F.3d at 1217, 1220. "An estimated 100,000 Chinese-Indonesians fled [the country] after the riots." A.R. 1001 (*Muzi Daily News*). Ethnic tensions exploded again in 2000, when a "mob of hundreds ran amok in Jakarta's Chinatown," smashing windows, attacking cars, and setting shops on fire. A.R. 349 (*CNN.com*).

[2] Muslim mobs have "burned and ransacked" Christian churches and seminaries throughout the country, and "[a]ttacks against minority houses of worship and the lack of an effective government response to punish perpetrators and prevent further attacks" indicate official complicity in these incidents. A.R. 643 (*Country Report*). Attacks against Christians in the Maluku islands have been particularly devastating; "[o]f the 150,000 Christians on the island [of Halmahera], hundreds have been killed and over half are now refugees or displaced from their homes. . . . Anything Christian, including family homes, churches, schools, and hospitals, has been destroyed." A.R. 1116 (*The Irish Times*). Dozens of militant Muslim groups calling for a holy war operate in the area. A.R. 398 (*Newsweek*).

been arrested, beaten, threatened, raped, and robbed. During the massive anti-Chinese pogroms of the 1960's, the Indonesian military repeatedly arrested Ms. Lolong's father, once holding him for "two weeks," during which he was "beaten" and not "given food." A.R. 243-245 (*Transcript*). Around the time of the 1998 riots, "indigenous Indonesians" attacked Ms. Lolong's uncle and beat him so severely that his face required surgery. A.R. 264 (*Transcript*). Two of Ms. Lolong's Chinese friends were kidnapped at knife-point. A.R. 1097 (*Transcript*). Although one of the two women escaped and sought help, "the police wouldn't help." A.R. 258 (*Transcript*). The other woman was raped and later, ashamed and embarrassed, "tried to commit suicide." *Id.* That same year, Ms. Lolong's cousin's home was burglarized; police were of "no use." A.R. 266 (*Transcript*). After Muslim extremists threatened to bomb their church, Ms. Lolong's parents sharply curtailed their religious practices. A.R. 297 (*Transcript*). Nevertheless, in September 2000, Ms. Lolong's mother saw "hundreds" of Muslim demonstrators gathered near her church, "waving flags," and "repeating that they were intent on killing Christians." A.R. 311 (*Transcript*). Ethnic Indonesians regularly touched Ms. Lolong in an offensive and sexual manner and taunted her with ethnic slurs. A.R. 216-17 (*Transcript*). Unable to continue her education in Indonesia because of quotas limiting "the numbers of ethnic Chinese" admitted to universities, Ms.

Lolong came to the United States on January 4, 1990. A.R. 210, 247 (*Transcript*). "For the same reasons," her two brothers left Indonesia to study in Australia. A.R. 250-252 (*Transcript*).

STATEMENT OF THE CASE

After finding her testimony fully credible, the immigration judge ("IJ") concluded that Ms. Lolong has a well-founded fear of persecution based on her ethnicity and religion. A.R. 72, 76-78 (*IJ Decision*). Although a divided panel of the Board of Immigration Appeals ("the Board" or "BIA") sustained the government's appeal, A.R. 3 (*BIA Decision*), this Court reversed, holding that Ms. Lolong "has demonstrated that Indonesians of Chinese ethnicity are a significantly disfavored group," and that she had a "sufficient particularized risk to support her asylum claim." *Lolong*, 400 F.3d at 1220.

ARGUMENT

I. THE REAL ID ACT UNDERMINES *MOLINA-CAMACHO*, AND THIS COURT HAS JURISDICTION OVER MS. LOLONG'S PETITION.

In *Molina-Camacho,* the BIA reversed an IJ decision granting cancellation of removal and ordered the petitioner removed without first remanding to the IJ. *Molina-Camacho v. INS*, 393 F.3d 937, 939 (9th Cir. 2004). Finding that only an IJ may enter an order of removal in the first instance, this Court concluded that

"[t]he BIA's *ultra vires* act of issuing the order of removal renders that portion of the proceedings a 'legal nullity.'" *Id.* at 941-42 (quoting *Noriega-Lopez v. Ashcroft,* 335 F.3d 874, 884 (9th Cir. 2003)). Given the absence of a valid final order of removal, the Court found that it lacked jurisdiction to entertain the petition for review. *Molina-Camacho,* 393 F.3d at 942. Because the petition could be reviewed in habeas proceedings, however, the Court transferred the petition to the district court under 28 U.S.C. § 1631. *Id.* The REAL ID Act of 2005, Pub. L. No. 109-13, enacted May 11, 2005, overrules this aspect of *Molina-Camacho.*

The REAL ID Act provides that "no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision," to review any "final order" of removal **or** any "question[ ] of law or fact" "arising from any . . . proceeding brought to remove an alien from the United States." 8 U.S.C. § 1252(b)(9), as amended by REAL ID § 106(a)(2) (emphasis added). Certainly, whether the BIA acted beyond its authority in ordering an alien removed in the first instance is a "question[] of law . . . arising from an[] action taken to remove an alien from the United States." Under the plain language of the REAL ID Act, therefore, this Court would be without authority to transfer petitions like this one to a district court pursuant to *Molina-Camacho.*

Insofar as the REAL ID Act purports to eliminate habeas corpus jurisdiction

in cases like this one, it raises a serious constitutional question. Article I, § 9, cl. 2 of the United States Constitution ("the Suspension Clause") provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it." "Because of that Clause, some `judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" *INS v. St. Cyr*, 533 U.S. 289, 300, (2001), *quoting Heikkila v. Barber*, 345 U.S. 229, 235 (1953). "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301, *quoting Felker v. Turpin*, 518 U.S. 651 (1996). Because pure questions of law (like whether the BIA has authority to issue a removal order in the first instance) could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus, "it necessarily follows that a serious Suspension Clause issue would be presented" if this Court were to conclude that the INA "has withdrawn that power from federal judges and provided no adequate substitute for its exercise." 533 U.S. at 305.

To avoid that serious constitutional question, the Court must reconsider *Molina-Camacho* and find that it has jurisdiction to review decisions in which the BIA issued an order of removal in the first instance. *See St. Cyr*, 533 U.S. at 300 ("if an otherwise acceptable construction of a statute would raise serious

constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (internal citations omitted). In exercising that jurisdiction, the Court would, of course, be able to consider whether the Board erred in failing to remand a *Molina-Camacho* type case for further proceedings before the IJ.

II. EN BANC REHEARING IS NOT WARRANTED IN THIS CASE.

A. The Analytical Framework This Court Adopted in *Kotasz* and Applied in *Lolong* is Perfectly Consistent With the Governing Regulations.

Notwithstanding respondent's protestations to the contrary, the former Immigration and Naturalization Service[3] did not "fill" all the interpretive gaps in the refugee definition when it promulgated the predecessor to 8 C.F.R. 208.13(b)(2)(C)(iii). To the contrary, "the regulation is, deliberately, far from comprehensive [and] it does not purport to cover the entire range of persecution related to group membership. Rather, the regulation leaves the standards governing non-pattern or practice cases to be developed through case law, as before." *Kotasz*, 31 F.3d at 853; *see also Makonnen*, 44 F.3d at 1383 (same); *Chen*, 195

[3] Pursuant to the *Department of Homeland Security Reorganization Plan*, as of March 1, 2003, the INS was abolished and its functions were transferred to the Department of Homeland Security ("DHS"), 6 U.S.C. § 542.

F.3d at 203-204 (citing *Kotasz* and noting that "[i]ndividual targeting and systematic persecution do not necessarily constitute distinct theories.").

As noted in *Kotasz*, "[g]roup membership is an aspect of nearly all asylum claims, not a special problem limited to pattern or practice cases." 31 F.3d at 853. As the Court explained:

> In the non-pattern or practice cases, there is a significant correlation between the asylum petitioner's showing of group persecution and the rest of the evidentiary showing necessary to establish a particularized threat of persecution. Specifically, the more egregious the showing of group persecution - the greater the risk to all members of the group - the less evidence of individualized persecution must be adduced. This correlation can be complicated by the fact that, within broad groups subject to some degree of hostile treatment, subgroups may exist whose members face an even greater or more particularized threat of persecution. These persons, when seeking asylum, have a correspondingly lesser burden of showing individualized targeting. In some cases, of course, where persecution of the subgroup is systematic, the subgroup member may meet his burden of showing a well-founded fear of persecution simply by showing membership in the subgroup. The main point, at any rate, is that the categories of group targeting and individual targeting are not absolute and distinct. In most cases, they co-exist.

Id.; *see also*, *Sael*, 386 F.3d at 925; *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003); *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000); *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996).[4]

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[4] The Fourth and Eighth Circuits have explicitly adopted *Kotasz*' analytical framework for asylum claims. *See Chen*, 195 F.3d at 203-204 (citing *Kotasz* and noting that "[i]ndividual targeting and systematic persecution do not necessarily constitute distinct

The disfavored group analysis does not, as the respondent claims, "bypass[] the need to establish actual individual risk absent a pattern or practice of persecution." *Respondent's Petition* at 1. In fact, *Kotasz* is explicit on this point, holding that "the petitioner can not simply prove that there exists a generalized or random possibility of persecution in his native country; he must show that he is at particular risk." *Kotasz*, 31 F.3d at 852; *see also*, *Chand*, 222 F.3d at 1076.

Moreover, neither *Kotasz* nor this Court's decision in *Lolong* is inconsistent with *Matter of A-M-*, 23 I & N Dec. 737 (BIA 2005). In that case, the Board declined to extend *Kotasz*' disfavored group analysis to applications for withholding of removal. That refusal makes sense. Because an applicant for withholding must establish a probability of persecution, an alien who has not been singled out for persecution will be able to meet her burden only if she is a member of a group that is facing a pattern and practice of persecution. As the BIA itself recently explained:

> Asylum has a lower standard of proof than that required for withholding of removal. Under the Ninth Circuit's decision in *Sael*, an alien seeking asylum, who is a member of a disfavored group, need only meet a "comparatively low" burden of demonstrating individualized risk.

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theories."); *Makonnen*, 44 F.3d at 1383 (citing *Kotasz*' explanation of the relationship between the risk of persecution faced by an individual and to danger faced by the disfavored group to which she belongs in reversing a BIA decision for failing "to consider the possibility of non-pattern-and-practice persecution.")

> However, **the Ninth Circuit did not indicate in *Sael* that the reduced burden of proof required for asylum seekers applies to aliens who must meet the higher, and less elastic, clear probability standard required for withholding of removal.**

In re: Yuri Ricardo Lolong, No. A72-962-454 (BIA March 31, 2005)(emphasis added). Since the BIA has held that the "comparatively low" burden for members of a disfavored group does not apply to withholding of removal, its failure to apply the test in *A-M-* can not be read as "clear statement that there is no room for a 'disfavored group' test," as respondent suggests. *Respondent's Petition* at 11.

B. This Court's application of *Sale* and *Lolong* has been consistent.

Only by ignoring the different standards applicable to asylum and withholding applications can the respondent argue that this Court has been inconsistent in applying *Sale* or *Lolong*. Indeed, of the seven unpublished cases respondent cites to support that contention, five deal exclusively with withholding.[5] *See Chandra v. Gonzales*, No. 03-73879, 2005 U.S. App. LEXIS 3051 (9th Cir. Feb. 22, 2005); *Tombuku v. Gonzales*, No. 03-70808, 2005 U.S. App. LEXIS 2437 (9th Cir. Feb. 14, 2005); *Lu v. Ashcroft*, No. 04-70802, 2005 U.S. App. LEXIS 877 (9th Cir. Jan. 18, 2005); *Tedja v. Ashcroft*, No. 03-73316, 2005 U.S.

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[5]*See* Ninth Circuit Rule 36-3(b)(iii)(permitting the citation of unpublished decisions to "demonstrate the existence of a conflict.").

App. LEXIS 904 (9th Cir. Jan. 18, 2005); *Tengker v. Ashcroft*, No. 04-70174, 2005 U.S. App. LEXIS 735 (9th Cir. Jan. 13, 2005). In the other two cases, the Court found that the petitioner had failed to establish a particularized risk of persecution. That hardly renders those decisions inconsistent with *Lolong*, however, because, as noted, Ms. Lolong's family and friends have been particularly affected by the anti-Chinese violence that periodically engulfs Indonesia, and this Court has long recognized that such attacks can establish a particularized risk of persecution. *See Ramirez Rivas v. INS*, 899 F.2d 864, 871 (9th Cir. 1990)(finding petitioner to be a likely target of persecution due to political opinion, where several family members and friends were killed and where the petitioner's youth and visits to political prisoners increased the danger to her, despite the fact that she was never threatened or singled out).[6]

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[6] It is simply untrue that this Court has not uniformly applied the *Kotasz* analysis to cases brought by ethnic Chinese Indonesians; although the respondent does not mention them, there are no fewer than fifteen unpublished Ninth Circuit decisions which apply the test outlined in *Kotasz* and *Sael*, to asylum claims brought by ethnic Chinese Indonesians. *See Setya v. Gonzales*, 2005 U.S. App. LEXIS 9669, (9th Cir. May 24, 2005); *Herman v. Gonzales*, 2005 U.S. App. LEXIS 6382 (9th Cir. April 11, 2005); *Gunawan v. Gonzales*, 2005 U.S. App. LEXIS 5826 (9th Cir. April 7, 2005); *Oey v. Ashcroft*, 2005 U.S. App. LEXIS 5529 (9th Cir. April 4, 2005); *Oey v. Ashcroft*, 2005 U.S. LEXIS 5633 (9th Cir. April 4, 2005); *Siauw v. Gonzales*, 2005 U.S. App. LEXIS 3163 (9th Cir. Feb. 23, 2005); *Oeyono v. Gonzales*, 2005 U.S. App. LEXIS 2691 (9th Cir. Feb. 15, 2005); *Widjaja v. Gonzales*, 2005 U.S. App. LEXIS 2425 (9th Cir. Feb. 14, 2005); *Mualim v. Ashcroft*, 2005 U.S. App. LEXIS 779 (9th Cir. Jan. 14, 2005); *Suwandi v. Ashcroft*, 2005 U.S. App. LEXIS 778 (9th Cir. Jan. 14, 2005); *Inamonica v. Ashcroft*, 2004 U.S. App. LEXIS 25698 (9th Cir. Dec. 10, 2004); *Tee v. Ashcroft*, 2004 U.S.App. LEXIS 25686 (9th Cir. Dec. 10,

Finally, the fact that this Court has refused to classify Coptic Christians in Egypt as a disfavored group, *see Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004), is simply irrelevant to whether Indonesian ethnic Chinese Christians constitute such a group. Obviously, the Court's refusal to treat Coptic Christians as a disfavored group says nothing about whether Indonesian ethnic Chinese Christians deserve such status.

C. The Third Circuit's Decision in *Lie v. Ashcroft* Is Unpersuasive and Inconsistent With the Jurisprudence of the Fourth, Fifth, Eighth and Ninth Circuits.

While respondent is correct in noting that the Third Circuit has rejected *Kotasz*' analytical framework,[7] it fails to mention that it is the only circuit to do so, or that the Fourth and Eighth Circuits have expressly embraced *Kotasz*. Moreover, *Lie* is in direct conflict with *Eduard*, 379 F.3d at 192, where the Fifth Circuit found a pattern and practice of persecution against Christians in Indonesia. *Eduard*

2004); *Tanudjaja v. Ashcroft*, 2004 U.S. App. LEXIS 25668 (9th Cir. Dec. 10, 2004); *Halim v. Ashcroft*, 2004 U.S. App. LEXIS 19055 (9th Cir. Sept. 8, 2004); *Soeth v. Ashcroft*, 2004 U.S. App. LEXIS 11660 (9th Cir. June 10, 2004).

[7] In *Lie*, the Third Circuit held that, in spite of "evidence in the record of widespread attacks on Chinese Christians in Indonesia, . . . such violence does not appear to be sufficiently widespread as to constitute a pattern and practice." *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005). The court went on to state that it "disagree[d] with the Ninth Circuit's use of a lower standard for individualized fear absent a 'pattern or practice' of persecution and, similarly, [] reject[ed] the establishment of a 'disfavored group' category." *Id.* at 538

addressed the asylum claims of a married Christian Indonesian couple, an ethnic Chinese woman, and her husband, who was of Manado ancestry but often was presumed to be Chinese because of his physical features. *Id.* at 187-188. The court in *Eduard* cited a State Department report detailing "122 religiously motivated attacks on Christian churches and other Christian facilities during 2000," which resulted in "3,000 deaths, the displacement of nearly 500,000 people, and damage to at least 81 churches and dozens of mosques." *Id.* at 192 (internal quotation marks omitted). The court also noted the petitioner's testimony that "killings, bloodshed, burnings, [and] persecutions of Christians are happening all over Indonesia," and expert testimony confirming that "the Laskar Jihad, in its efforts to convert Christians to Islam, routinely burns churches and commits physical acts of violence against Christians." *Id.* On this basis, the court found that, "it is clear from the record, and the IJ's findings, *that there was a pattern of persecution of Christians in Indonesia.* Thus, Petitioners were not required to show that they would be singled out for persecution on return to Indonesia." *Id.* (emphasis added). Inconsistent with the position it is taking in this case - i.e. that recognizing Indonesian ethnic Chinese Christians as a disfavored group will open the floodgates - the government did not even seek rehearing of the Fifth Circuit's decision.

III. THIS COURT SHOULD AMEND ITS DECISION TO HOLD THAT ETHNIC CHINESE CHRISTIAN WOMEN IN INDONESIA FACE A PATTERN AND PRACTICE OF PERSECUTION AND THAT, IN ANY EVENT, MS. LOLONG FACES A PARTICULARIZED RISK OF PERSECUTION ABOVE AND BEYOND HER MEMBERSHIP IN A PARTICULARLY DISFAVORED SUBGROUP.

A. This Court Should Clarify That Ms. Lolong Does Face a Particularized Risk of Persecution Above and Beyond Her Membership in Particularly Disfavored Sub-Groups.

Although the Court's decision notes that Ms. Lolong may meet her burden of proof by showing that "she is a member of a sub-group that faces a heightened risk of future persecution," it also details the particularized risk faced by Ms. Lolong individually. *Lolong*, 400 F.3d at 1221 (citing *Kotasz*, 31 F.3d at 854). First, the Court noted that "Lolong's parents decided to attend church less often after threats of violence were made during demonstrations near their church and after their church received bomb threats." *Id.* Second, the Court stated that "the experiences of persons most similarly situated to Lolong - two ethnic Chinese Christian women of Lolong's age group and from the same community - support Lolong's claim." *Id.* at 1223. Third, the Court found that "contrary to the respondent's assertion, many of Lolong's family members have experienced at least some harm on account of their ethnicity or religion," citing the multiple arrests and beatings inflicted on her father, the robbery and brutal beating of her uncle, and

the "loss of religious and personal freedom" suffered by her parents. *Id.* Thus, notwithstanding respondent's contention to the contrary, the *Lolong* decision does not hold that an applicant is not required to show a particularized risk of persecution. Rather, by citing the numerous examples of harm suffered by Ms. Lolong's family and friends, the Court implicitly holds that Ms. Lolong did meet her burden.

B. Alternatively, This Court Should Reach the Issue of Whether There Is a Pattern and Practice of Persecution of Ethnically-Chinese Christians in Indonesia, in Keeping With the Fifth Circuit's Decision in *Eduard*.

Consistent with the Fifth Circuit decision in *Eduard v. Ashcroft*, 379 F.3d at 192, the Court should amend its decision and hold that the evidence compels the conclusion that ethnic Chinese Christian Indonesians face a pattern or practice of persecution.

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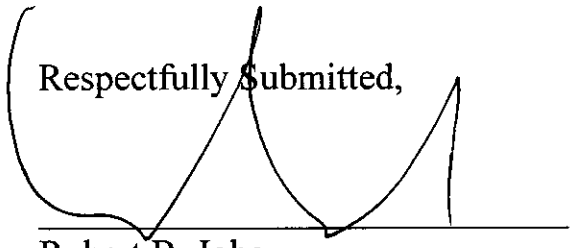
CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing *en banc* in this case.

Dated: July 27, 2005

Respectfully Submitted,



Robert B. Jobe
LAW OFFICE OF ROBERT B. JOBE
Counsel for Petitioner

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-72384

MARJORIE LOLONG,

Petitioner,

v.

ALBERTO GONZALES,
U.S ATTORNEY GENERAL,

Respondent.

On Petition for Review of a Decision of
The Board of Immigration Appeals

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO COURT'S ORDER

Robert B. Jobe
Fatma Marouf
LAW OFFICE OF ROBERT B. JOBE
550 Kearny, Suite 150
San Francisco, CA 94108
Tel. (415) 956-5513

Attorneys for Petitioner

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INTRODUCTION

By transforming the legal landscape of judicial review under the Immigration and Nationality Act ("INA"), the REAL ID Act of 2005 superseded this Court's decisions in *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), and *Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003). Furthermore, both *Molina-Camacho* and *Noriega-Lopez* actually treated the BIA's "*ultra vires*" orders as "final orders of removal" by finding that the district court had jurisdiction to review the cases through habeas proceedings and, in the case of *Noriega-Lopez,* by applying a provision of the Immigration and Nationality Act that bars judicial review of "final orders of removal" where the alien has been convicted of an aggravated felony and/or a controlled substance prohibition. In order to avoid such internally inconsistent decisions, as well as the serious constitutional issues that would arise if this Court were to conclude that it did not have jurisdiction, the Court should apply the presumption in favor of judicial review and exercise its jurisdiction over the merits of this case. If, however, the Court declines to do so, then it must find that the REAL ID Act, as applied to the facts of this case, violates the Suspension Clause of the U.S. Constitution by stripping Ms. Lolong of any adequate or effective judicial remedy.

ARGUMENT

I. THE COURT'S DECISION IN *MOLINA-CAMACHO* IS INAPPLICABLE BECAUSE THE REAL ID ACT CHANGED THE LEGAL LANDSCAPE OF JUDICIAL REVIEW.

In *Molina-Camacho*, *supra*, this Court addressed "whether a case where no final order of removal has been issued falls outside of the 'jurisdiction granting' provision of IIRIRA, 8 U.S.C. §1252." Reasoning that "[t]he BIA's *ultra vires* act of issuing the order of removal render[ed] that portion of the proceedings a 'legal nullity," the Court concluded that it lacked jurisdiction. *Id.* at 941-42. However, the Court found that the BIA's order could be reviewed under 28 U.S.C. §2241 and therefore treated the petition for review as a petition for habeas corpus, ordering it transferred to the district court under 28 U.S.C. §1631. *Id.* at 942.

On May 11, 2005, Congress enacted the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231. The REAL ID Act significantly changed the "jurisdiction granting" provisions that were interpreted by the Court in *Molina-Camacho*. Section 106(a)(2) of the Act amended INA § 242(b)(9), 8 U.S.C. §1252(b)(9), to state that "no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision," to review any "final order" of removal or any "question[] of law or fact" arising "from any . . . proceeding brought to remove an alien from the United States." In addition,

Section 106(a)(1) of the REAL ID Act added INA §242(a)(5), 8 U.S.C. §1252(a)(5), which states that "a petition for review filed with the appropriate court of appeals in accordance with this section shall be the *sole and exclusive* means for judicial review of an order of removal entered or issued under any provision of this Act." (emphasis added). This Section clarifies that in all immigration provisions restricting judicial review, "judicial review" and "jurisdiction to review" include habeas and other non-direct review and that federal appellate review in accordance with the procedures set forth in INA § 242, 8 U.S.C. § 1252, is the only avenue available for review of a removal order under the INA (except for the review procedure specified for expedited removal orders for arriving aliens under § 242(e) of the INA). The REAL ID Act also explicitly eliminated habeas review with respect to denials of certain forms of discretionary relief and final orders of removal against aliens with certain criminal convictions, although it added language clarifying that constitutional claims or questions of law could be raised through petitions for review filed in the courts of appeal. REAL ID Act § 106(a)(1)(A)(ii)-(iii); INA §242(a)(2)(B)-(D), 8 U.S.C. § 1252(a)(2)(B)-(D). Moreover, habeas review was explicitly eliminated for claims under the United Nations Convention Against Torture. REAL ID Act § 106(a)(1)(B); INA § 242(a)(4), 8 U.S.C. § 1252(a)(4). The REAL ID Act also amended INA §

242(g), 8 U.S.C. § 1252(g), concerning exclusive jurisdiction to state that no habeas review or other non-direct judicial review is available for any claim arising from a decision or action by the Attorney General regarding the initiation and adjudication of removal proceedings or the execution of removal orders against any alien. REAL ID Act § 106(a)(3); INA § 242(g), 8 U.S.C. § 1252(g).

Since the REAL ID Act transformed and superseded the jurisdictional provisions of INA § 242, 8 U.S.C. §1252 that were interpreted by this Court in *Molina-Camacho,* as well as most other provisions pertaining to judicial review, that case does not control this Court's interpretation of the statute as amended by the REAL ID Act. *Noriega-Lopez, supra*, is also inapplicable, as it construed the same superseded statute as *Molina-Camacho.* The situation presented here is similar to that presented in *Xi v. INS*, 298 F.3d 832, 837 (9th Cir. 2002) (holding that INA § 241(a)(6), 8 U.S.C. §1231(a)(6) does not permit the indefinite detention of an individual who has been deemed inadmissible to the United States), where the Court rejected the government's argument that the case was governed by the en banc decision in *Barrera-Echavarria v. Rison,* 44 F.3d 1441 (9th Cir. 1995) (approving the protracted detention of "excludable" aliens) because the statute interpreted in *Barrera-Echavarria* "no longer exists." 298 F.3d at 837. Instead, the Court based its decision on the Supreme Court's interpretation of 8

U.S.C. §1231(a)(6), which was added to the INA by IIRIRA in 1996. The Court explained:

> The government asks us to read §1231(a)(6) in light of the statutory holding in *Barrera-Echavarria.* Doing so, however, is <u>untenable</u>. This is not only because of the absence of any provision in the INA's earlier incarnation that corresponds to §1231(a)(6), but also because *IIRIRA introduced an entire set of new legal concepts* purporting to redefine the "basic territorial distinction" at play in immigration law.

Id. at 837-38 (emphasis added). Just as IIRIRA transformed the law pertaining to territorial distinctions, the REAL ID Act introduced an entirely new legal landscape regarding the jurisdiction of the courts of appeal and the district courts in cases challenging orders of removal and exclusion.

Given the "substantial differences" (*id.* at 838) and "major statutory changes" (*id.*) between the provisions for judicial review set forth in INA § 242, 8 U.S.C. §1252, prior to the enactment of the REAL ID Act and after its amendments, it is "untenable" for this Court to decide whether or not it has jurisdiction in the present case based on the holding of *Molina-Camacho,* especially since the remedy identified by the Court in *Molina- Camacho* (treating the petition for review as a petition for habeas corpus) no longer exists for aliens in removal proceedings.[1] Pre-REAL ID Act cases interpreting the extent of the

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[1] As Colombia Law School professor Gerald L. Neuman has noted: "Courts

Court's jurisdiction or its powers of judicial review cannot be controlling authority. *See also United States v. Shipsey,* 363 F.3d 962, 969-70 (9th Cir. 2004) (finding "unavailing" the Court's decision in *United States v. Peloquin,* 810 F.2d 911 (9th Cir. 1987) because that case construed a "superseded statute" and the new version "broaden[ed] the text" of the statute).

In light of the new legal landscape created by the REAL ID Act, and as explained further below, the Court should apply the presumption in favor of judicial review and treat the BIA's order as a "final order of removal." *See, e.g, Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986) ("We begin with a strong presumption that Congress intends judicial review of administrative action."). *Accord Webster v. Doe,* 486 U.S. 592, 603 (1988); *Johnson v. Robison,* 415 U.S. 361, 373-74 (1974).

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and litigants will . . . need to bear in mind that their jurisdictional precedents from before the Real ID Act may no longer be controlling in the new statutory context." Neuman, Gerald, "The REAL ID Act and the Suspension Clause, 9 *Bender's Immigration Bulletin* 1555 (Oct. 15, 2005). *See also id.* at 1561 ("The courts of appeals will need to be open to reconsideration of their pre-REAL ID precedents now that habeas is presumptively unavailable. Especially given the volume of immigration appeals, courts will need to guard consciously against the reflex of letting earlier precedents carry over into the new statutory contest.").

II. *NORIEGA-LOPEZ* DID NOT HOLD THAT THE COURT OF APPEALS LACKED JURISDICTION BECAUSE THERE WAS NO "FINAL ORDER OF REMOVAL;" IN FACT, BOTH *MOLINA-CAMACHO* AND *NORIEGA-LOPEZ* TREATED THE BIA'S ORDER AS A "FINAL ORDER OF REMOVAL."

Noriega-Lopez, supra, did not address the jurisdictional question raised in the present case. In *Noriega-Lopez,* the IJ found that the agency's proffer of documentation was inadequate to prove by clear and convincing evidence that Noriega-Lopez had been convicted of an aggravated felony. *Id.* at 877. When the government appealed, the BIA vacated the IJ's order and ordered Noriega-Lopez removed to Mexico. *Id.* Noriega-Lopez then filed a petition for review with the Ninth Circuit. After the Ninth Circuit directed him to show cause why the petition should not be dismissed for lack of jurisdiction, Noriega-Lopez moved for *voluntary dismissal*, which was granted. *Id.* Noriega-Lopez then filed a habeas petition in the District Court, raising two issues. First, he argued that INS had failed to meets its burden of proving his conviction. *Id.* Second, he argued that the BIA had usurped the authority of the IJ by entering its own order of removal. *Id.* The District Court denied the habeas petition, finding that it lacked jurisdiction over the first issue because Noriega-Lopez failed to exhaust his judicial remedies and rejecting the second argument on the merits because Noriega-Lopez failed to show that he is entitled to relief from removal. *Id.* at 877-

78. This Court affirmed that the District Court had no jurisdiction to review Noriega-Lopez's insufficient documentation claim because he failed to exhaust judicial remedies by voluntarily dismissing his appeal. *Id.* at 879-80. With respect to Noriega-Lopez's claim that the BIA did not have authority to enter its own removal order, however, this Court found no exhaustion problem. The Court reasoned that Noriega-Lopez's voluntary dismissal of his appeal resulted in a final resolution of his aggravated felony conviction and the Ninth Circuit "lack[ed] jurisdiction on direct review *over challenges to an order of removal against an aggravated felon and/or controlled substance offender.*" *Id.* at 880 (*emphasis added*). [2] At no point did the Court find that it lacked jurisdiction because no "final order of removal" had been entered. On the contrary, by finding that there had been "final resolution" of the aggravated felony conviction, the Court considered the BIA's order "final." Furthermore, by applying the jurisdictional bar set forth in INA §242(a)(2)(C), 8 U.S.C. §1252(a)(2)(C), which provides that "no court has jurisdiction to review *any final order of removal* against an alien

[2] The REAL ID Act added new INA §242(a)(2)(D), 8 U.S.C. §1252(a)(2)(D), which provides that the bars to judicial review do *not* apply if the petition for review raises a question of law or constitutional claim. Thus, if Noriega-Lopez's petition for review had been brought after the REAL ID Act became effective, this Court would not have been able to apply the same reasoning about why Noriega-Lopez had exhausted his judicial remedies with respect to his *ultra vires* claim.

who is found removable for having committed a criminal offense" covered in certain sections of the INA, the Court actually treated the BIA's order as a "final order of removal."

Molina-Camacho relied on *Noriega-Lopez* in finding that prudential exhaustion requirements would not have barred the district court from considering Molina-Camacho's habeas petition at the time he filed his petition for review. *Molina-Camacho,* 393 F.3d at 942 (citing *Noriega-Lopez,* 335 F.3d at 880).[3] However, neither *Molina-Camacho* nor *Noriega-Lopez* addressed the important question of how the district court would have jurisdiction over a habeas petition without a "final order of removal." Although a habeas petitioner must be "in custody," this Court has "broadly construed 'in custody' to apply to situations in which an alien is not suffering any actual physical detention; i.e., so long as he is subject to a final order of deportation, an alien is deemed to be `in custody' for purposes of the INA, and therefore may petition a district court for habeas review

[3] *Molina-Camacho* quoted *Noriega-Lopez* somewhat out of context, suggesting that the court in *Noriega-Lopez* lacked jurisdiction on direct review for the same reason as the court in *Molina-Camacho* lacked jurisdiction and omitting the fact that the Court in *Noriega-Lopez* determined that it lacked jurisdiction on direct review to consider the *ultra vires* issue because it lacked jurisdiction to review challenges to an order of removal against an aggravated felon and/or controlled substance offender. *See Noriega-Lopez,* 335 F.3d at 880.

of that deportation order." *Nakaranurack v. United States*, 68 F.3d 290, 293 (9th Cir. 1995). *See also, Miranda v. Reno*, 238 F.3d 1156, 1158 (9th Cir. 2001), *cert. denied,* 534 U.S. 1018 (2001) ("[A]n immigrant still in United States custody may seek habeas review of a *final order of removal*) (emphasis added); *Duvall v. Elwood*, 336 F.3d 228 (3d Cir. 2003) (finding that habeas review is barred under 1252(d)(1) where there was no final order of removal); *Sundar v. INS,* 328 F.3d 1320 (11th Cir. 2003) (finding that 8 U.S.C. 1252(d)(1) applies to §2241 habeas proceedings and dismissing petition for failure to seek BIA review even if there was perceived futility); *Riley v. INS*, 310 F.3d 1253, 1256 (10th Cir. 2002) (affirming that the district court "had jurisdiction to consider Appellant's challenges to his final deportation order").

Molina-Camacho does not mention the alien being in physical custody. Thus, the only way that Molina-Camacho could seek relief through habeas proceedings was if he was subject to a "final order of removal." By finding that no final order had been issued for purposes of direct appellate review but nevertheless transferring the case to the district court for habeas review, the Ninth Circuit effectively treated the order as a "final order of deportation" and acted inconsistently with its own decision.

III. THE INA AND THE GOVERNING REGULATIONS CAN FAIRLY BE CONSTRUED AS AUTHORIZING THE BIA TO ISSUE FINAL ORDERS OF REMOVAL AND ALLOWING THE COURT TO EXERCISE ITS JURISDICTION IN THIS CASE.

The Court should now eschew the internal contradictions of *Molina-Camacho* and *Noriega-Lopez* and avoid the serious constitutional questions that would arise if the Court determines that it lacks jurisdiction (discussed in Part IV below), by treating the BIA's order in the present case as a "final order of deportation" for purposes of direct review. Not only is this interpretation of the INA "fairly possible" given the transformative changes created by the REAL ID Act, it is the prevailing interpretation in other circuits.

The term "order of deportation" is defined by INA § 101(a)(47), 8 U.S.C. §1101(a)(47), which states:

> (A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.
>
> 1. The order described under subparagraph (A) shall become final upon the earlier of –
>
> (i) a determination by the Board of Immigration Appeals affirming such order; or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

Neither of these subparagraphs specifies how or when an order becomes "final" if the IJ finds that the alien is not deportable but the BIA reverses. The statute does not state that the order becomes final only after the case is "remanded" to the IJ for an order of removal. "[When] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984). Here, the agency, like Ms. Lolong, has taken the position that the BIA's order is a final order of removal that is reviewable by this Court.

This interpretation is consistent with published cases in several Circuits, including this one, which have taken for granted the BIA's power to order an alien removed. *See, e.g, Moussa v. INS,* 302 F.3d 823, 825 (8th Cir. 2002) (finding that the Court had jurisdiction in a case where "the BIA ordered [Moussa's] removal from the United States and vacated the IJ's order"); *Nen Ying Wang v. Ashcroft,* 368 F.3d 347, 348-49 (3d Cir. 2004) (stating that the Court had jurisdiction to review the BIA's "final order of removal" where the BIA "vacated the IJ's order [granting withholding of removal] and ordered Wang to be removed to China"); *Singh-Kaur v. Ashcroft,* 385 F.3d 293, 296 (3d Cir. 2004) ("[T]he BIA vacated the

IJ's order and ordered Singh removed from the United States"); *Ortega v. United States AG*, 416 F.3d 1348, 1350 (11th Cir. 2005) ("The BIA vacated the decision of the IJ and ordered Ortega removed from the United States."). In *Padash v. INS,* 358 F.3d 1161, 1170 n. 7 (9th Cir. 2004), this Court noted that the term "final order of deportation" set forth in INA § 101(a)(47)(A)-(B), 8 U.S.C. 1101(a)(47)(A)-(B), is "a term of art in the immigration context referring to *the BIA's decision to order an immigrant deported* (*or the IJ's decision to do the same*, if the immigrant does not timely appeal)." (*Emphasis added*). This definition recognizes the BIA's authority to order an immigrant deported without limiting it to affirming an IJ's order of removal, although the BIA in that case did affirm the IJ's order of removal.

Moreover, because the statute expressly authorizes the Attorney General to delegate responsibility for "ordering deportation," the Court should find that the Board has the authority to enter such orders pursuant to 8 CFR 1003.1(d)(1)(ii), which provides, "a panel or Board member to whom a case is assigned may take *any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case*." (Emphasis added.) Indeed, the Supreme Court has forcefully emphasized that "absent constitutional constraints or extremely compelling circumstances the administrative agencies

should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978)(*internal quotations and citations omitted*).

The regulations also indicate that INA § 101(a)(47)(B), 8 U.S.C. §1101(a)(47)(B), is not a complete list of the ways for the order of removal to become "final." 8 C.F.R. §1241.1 indicates that an "order of removal made by the immigration judge" shall become "final" in several other ways, including upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal by the respondent, and, if certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal. In addition, 8 C.F.R. § 1241.1(f) describes a situation somewhat analogous to the present case where the IJ issues an alternate order of removal in connection with a grant of voluntary departure. In that situation, if the respondent overstays and files an appeal with the Board, "the order shall become final *upon an order of removal by the Board* or the Attorney General, or upon overstay of any voluntary departure period granted by the Board or the Attorney General." *(Emphasis added.) See also* 8 C.F.R. § 1003.1(d)(6) (finding that the Board is empowered "to deny the relief sought" and "is not required to remand" the case where an alien fails to complete identity, law

enforcement or security investigations or examinations).

8 C.F.R. § 1003.1(d)(7) further indicates that the Court has jurisdiction to review this case. This section provides that "the decision of the Board *shall be final* except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section." Since 8 C.F.R. § 1003.1(d)(7) indicates that the Board has the power to enter a final decision determining that the alien is deportable or removable, and INA § 101(a)(47)(A), 8 U.S.C. §1101(a)(47)(A), specifies that the term "order of deportation" includes an order "concluding that the alien is deportable," reading these two sections together indicates that the Board can issue a final order of deportation. Moreover, by stating that the Board "*may* return a case to the Service or an immigration judge for such further action as may be appropriate," the regulations indicate that the Board is not *required* to do so. 8 C.F.R. § 1003.1(d)(7) (*emphasis added*).

In interpreting INA § 101(a)(47), U.S.C. § 1101(a)(47), as specifying that only an IJ is authorized to issue orders of removal, *Noriega-Lopez* looked not only at the language of the statute but at the legislative history of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1213, since paragraph 47 was added by AEDPA § 440(b). The Court drew a connection between 8 U.S.C. §1101(a)(47) and AEDPA's elimination of judicial

review for orders of deportation entered against certain criminal aliens, stating that "Congress envisioned a sequential process involving (1) entry of a removal order by the IJ and (2) subsequent review of this order by the BIA." 335 F.3d at 884. This indicates that Congress simply was not focused on the situation where the IJ does not find the alien removable and the BIA disagrees. Furthermore, insofar as the Court's interpretation of 8 U.S.C. §1101(a)(47) in *Noriega-Lopez* was based on the legislative history of the AEDPA, this interpretation is no longer relevant since the REAL ID Act lifted the ban on judicial review of orders of removal entered against aliens with certain criminal convictions. *See* REAL ID Act § 106(a)(1)(A)(iii); INA § 242(a)(2)(D), 8 U.S.C. §1252(a)(2)(D) (as amended). This amendment restored judicial review of constitutional claims and questions of law presented in petitions for review of final removal orders, even in cases where the alien had been convicted of an aggravated felony. *See Fernandez-Ruiz v. Gonzales,* 410 F.3d 585, 587 (9th Cir. 2005). Thus, the most critical parts of AEDPA considered by *Noriega-Lopez* in interpreting INA § 101(a)(47), 8 U.S.C. § 1101(a)(47) have been superseded by the REAL ID Act. Based on the foregoing, the Court should find that it is fairly possible to interpret the INA and the governing regulations as authorizing the BIA to issue orders of removal and allowing the Court to exercise its jurisdiction in this case.

IV. THE COURT SHOULD CONSTRUE THE STATUTE AS ALLOWING IT TO EXERCISE ITS JURISDICTION IN ORDER TO AVOID SERIOUS CONSTITUTIONAL ISSUES UNDER THE SUSPENSION CLAUSE.

Under the REAL ID Act, this Court has no statutory authority to transfer this case to a district court and order that it be treated as a habeas petition. Thus, if this Court were to apply *Molina-Camacho* and find that it lacks jurisdiction to hear the merits of this case, a serious constitutional issue would arise under U.S. Const. Art. I, §9, cl. 2 ("the Suspension Clause"), which provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Great Writ "is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson,* 394 U.S. 286, 290-91 (1969). The Suspension Clause was added to the Constitution to deny Congress the power to block that remedy, except in situations of extraordinary emergency. *See* Gerald Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 969.

Due to the Suspension Clause, "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" *INS v. St. Cyr,* 533 U.S. 289, 300 (2001) (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)). "[A]t the

absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *Id.* at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). "[T]here is substantial evidence to support the proposition that pure questions of law. . . could have been answered in 1789 by a common law judge with power to issue the writ of habeas corpus." *St. Cyr,* 533 U.S. at 304-05. "Moreover, the issuance of the writ . . . encompassed detentions based on errors of law, including the erroneous application . . . of statutes." *Id.* at 302. Indeed, in tracing the history of habeas corpus, the Supreme Court has noted that "at the time that the Suspension Clause was written into our Federal Constitution and the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary, there was respectable common-law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law." *Fay v. Noia,* 372 U.S. 391, 405 (1963). *See also Flores-Miramontes v. INS*, 212 F.3d 1133, 1142 (9th Cir. 2000) ("Habeas relief for people detained by executive officials of the federal government, including aliens, has been guaranteed by statute since 1789, and in fact was available at common law when the Constitution was enacted"). The Federalists themselves argued that the Writ should be "provided for, in the most ample manner." *The Federalist,* No. 83 at 499 (Alexander Hamilton) (Clinton Rositer ed., 1961). Given the historical

evidence, it "necessarily follows" that "a serious Suspension Clause issue would be presented" if Congress "[withdrew] that power from federal judges and provided no adequate substitute for its exercise." *St. Cyr*, 533 U.S. at 304-05 (*emphasis added*).

Thus, serious constitutional questions would certainly be raised if this Court were to apply its interpretation of the former statue in *Molina-Camacho* and conclude that it lacked jurisdiction over this case. In order to avoid these serious constitutional issues, the Court should interpret the statute as allowing it to exercise its jurisdiction in this case. "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). Thus, "[i]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . we are obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 300-01. *See also Crowell v. Benson,* 285 U.S. 22, 62 (1932) ("[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided"); *United States v. Rumely,* 345 U.S. 41, 45 (1953) (giving special regard to "the principle of constitutional adjudication which makes

it decisive in the choice of fair alternatives that one construction [which] may raise serious constitutional questions [be] avoided by another"). In *Flores-Miramontes v. INS*, 212 F.3d 1133, 1141-42 (9th Cir. 2000), this Court adopted an interpretation of the immigration statute that allowed habeas review specifically "because doing so allows us to avoid the substantial constitutional questions that would arise were we to find that Congress had repealed the general federal habeas statute insofar as it applies to removal proceedings involving criminal aliens." The Court should apply the same reasoning here. Since Parts I-III above demonstrate that a construction of the statute is fairly possible which would avoid the serious constitutional issues discussed above, the Court should adopt this construction.[4]

If, however, the Court were to construe the statute as in *Molina-Camacho* and find that it lacked jurisdiction, Ms. Lolong would have *no opportunity* for judicial review of her claim. This would clearly constitute a violation of the Suspension Clause. Even a partial suspension of the Writ of Habeas Corpus can

[4] To the extent that the Court may have questions about the scope of the Suspension Clause's protections, this "difficult question . . . is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely." *St. Cyr*, 533 U.S. at 301, n.13. *See also* Neuman, 98 Colum. L. Rev. at 980 (noting that "reconstructing habeas corpus law . . . [for purposes of a Suspension Clause analysis] would be a difficult enterprise, given fragmentary documentation, state-by-state disuniformity, and uncertainty about how state practices should be transferred to new national institutions").

violate the Suspension Clause. *See, e.g., Henderson v. INS*, 157 F.3d 106, 115, 120 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1141 (1999); *Sandoval v. Reno,* 166 F.3d 225, 237 (3rd Cir. 1999); *Goncalves v. Reno,* 144 F.3d 110, 122-23 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1140 (1999); *Calcano-Martinez v. INS*, 232 F.3d 328, 342 (2d Cir. 1998), *aff'd, 533 U.S. 348 (2001)* (indicating that a partial repeal of habeas jurisdiction that would allow review of constitutional claims but not statutory challenges would violate the Suspension Clause); *Martinez-Villareal v. Stewart,* 118 F.3d 628, 635 (9th Cir. 1997) (Nelson, J., concurring) (finding that the ADEPA "unconstitutionally suspends the writ of habeas corpus as to competency to be executed claims . . . by prohibiting the consideration of claims in second or successive petitions that do not fit the exceptions found in § 2244(b)(1) and (2)").

Furthermore, if this Court found that it lacked jurisdiction, that would mean that a petition for review, under the facts of this case, cannot be considered an *adequate* and *effective* substitute for habeas review, as this Court found in *Molina-Camacho* that the District Court would have jurisdiction to review this type of claim through habeas proceedings. This, too, would indicate that a violation of the Suspension Clause has occurred. *See Swain v. Pressley*, 430 U.S. 372, 381-82 (1977) (holding that Congress may divest the district courts of habeas jurisdiction without violating the Constitution only if it substitutes "a collateral remedy which

is *neither inadequate nor ineffective* to test the legality of a person's detention") (*emphasis added*).

Indeed, the only way to provide an adequate and effective substitute for habeas review in the present case is for this Court to show the same flexibility that lies at the heart of habeas proceedings:

> The scope and flexibility of the writ -- its capacity to reach all manner of illegal detention -- its ability to cut through barriers of form and procedural mazes -- have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

Harris, 394 U.S. at 291. *See also Frank v. Mangum,* 237 U.S. 309, 346 (1915) (Holmes, J., joined by Hughes, J., dissenting) (1915) ("*Habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside . . . and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."); *Fay v. Noia*, 372 U.S. 391, 401-402 (1963) (stating that the function of the writ is "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints"). In short, to provide an adequate and effective remedy for Ms. Lolong, this Court must cut through the "form" of the BIA's order of removal and examine its substance. Otherwise, the Court would violate the writ's "root principle . . . that

in a civilized society, government must always be accountable to the judiciary." *Fay,* 372 U.S. at 402. In *Molina-Camacho,* the Court transferred the case to the District Court in order to "*ensure that Molina has the opportunity to challenge the ultra vires removal order before the government seeks to remove him using it.*" 393 F.3d at 942 (*emphasis added*). The Court should now ensure that Ms. Lolong has the same opportunity by exercising jurisdiction over her case.

The purpose of requiring a "final order of removal" prior to judicial review by the court of appeals is to ensure that the IJ and the BIA (in cases where an appeal was filed) have fully considered and adjudicated the issues. In the present case, it is clear that both the IJ and the BIA thoroughly examined Ms. Lolong's asylum claim. No factual allegations or legal arguments were raised before this Court that were not raised before the BIA. Furthermore, as the Court noted in *Noriega-Lopez,* "[t]here was no deliberate bypass of the administrative scheme" and "any bypass of the usual administrative exploration of issues was the fault of the BIA itself, not the petitioner." *Noriega,* 335 F.3d at 882. These are compelling reasons for the Court to show flexibility and address the merits of this case, rather than leaving Ms. Lolong subject to arbitrary government action with no judicial remedy. Other courts have demonstrated such flexibility in slicing through formality that serves no function. *See, e.g., Popal v. Gonzales, 416 F.3d*

249,253 (3d Cir. 2005) (finding that the court had jurisdiction even though the IJ's second order was not appealed to the BIA because neither judicial economy nor the congressional purpose of preventing unjustified delay in removal cases would be advanced by "interposing a second and wholly repetitive appeal to the BIA").

CONCLUSION

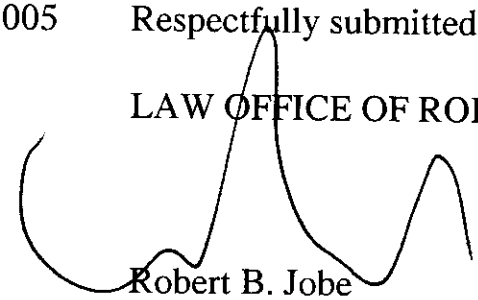
Based on the foregoing, the Court should treat the BIA's order as a "final order of deportation" and find that it has jurisdiction to decide the merits of this case. If, however, this Court finds that it does not have jurisdiction over this case, then no judicial remedy is available to Mr. Lolong in light of the provisions of the REAL ID Act purporting to eliminate habeas corpus relief. This raises serious constitutional issues about whether the REAL ID Act, as applied to the facts of this case, violates the Suspension Clause. These issues must be addressed in order to hold the government accountable and avoid arbitrary, irreparable harm to Ms. Lolong. If the Court goes down this difficult path, the absence of any adequate or effective judicial remedy for Ms. Lolong will necessarily lead to the conclusion that a violation of the Suspension Clause has occurred. In order to avoid these difficult constitutional questions, the Court should simply treat the BIA's order as a "final order of deportation" in light of the new legal landscape created by the

REAL ID Act, which, together with the language of the statute and the regulations, renders this interpretation "fairly possible."

Dated: November 29, 2005

Respectfully submitted

LAW OFFICE OF ROBERT B. JOBE



Robert B. Jobe
Fatma Marouf

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-72384

A77 427 355

MARJORIE KONDA LOLONG,
Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

SUPPLEMENTAL BRIEF FOR RESPONDENT

PETER D. KEISLER
Assistant Attorney General

JONATHAN F. COHN
Deputy Assistant Attorney General

DONALD E. KEENER
Deputy Director

FRANCIS W. FRASER
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0193

ATTORNEYS FOR RESPONDENT

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IN THE UNITED STATES COURT OF APPEALS
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SUPPLEMENTAL BRIEF FOR RESPONDENT

INTRODUCTION

This supplemental brief is submitted in response to the Court's October 4, 2005, Order directing the parties to simultaneously address three issues bearing on the Court's jurisdiction. For the reasons discussed in detail below, respondent respectfully urges the Court to preserve its jurisdiction in this case by rehearing *Molina-Camacho en banc.*

STATEMENT OF THE ISSUES

(1) "Whether we have jurisdiction to decide the merits of the above-captioned matter in light of *Molina-Camacho v. Ashcroft*, 393 F.3d 937, 941 (9th Cir. 2004), which held that the BIA had 'acted *ultra vires* in issuing a deportation

order instead of remanding to the IJ' and that we lacked jurisdiction on appeal because there is no final order of removal to review, *see id.* at 941;

(2) Whether, in light of the Real ID Act of 2005, which removed jurisdiction from the district court to entertain habeas appeals from an order of removal, *see* 8 U.S.C. § 1252(a)(5), and in light of *Molina-Camacho's* holding, there is any remedy available to the petitioner in this court;

(3) Whether, if no remedy is available in this court or the district court, the lack of a remedy raises constitutional problems that are appropriate and necessary to be addressed in this appeal, including whether we should ask an en banc court to revisit our decisions in *Molina-Camacho* and *Noriega-Lopez v. Ashcroft*, 335 F.3d 974 (9th Cir. 2003)."

STATEMENT OF THE CASE

I. Summary Of The Facts And Decisions Below.

Marjorie Konda Lolong was placed in removal proceedings by a Notice to Appear on February 22, 1999. Administrative Record ("A.R.") 1360. She applied for asylum and other relief. A.R. 81-82. The immigration judge found that Lolong was subject to removal, but he granted her application for asylum. The Board of Immigration Appeals ("BIA") sustained the appeal of the Immigration and Naturalization Service ("INS"), vacated the decision of the immigration judge, granted Lolong voluntary departure, and ordered her removed if she did not depart voluntarily. A.R. 2-3.

II. Proceedings In This Court.

Lolong filed a petition for review in this Court from the decision of the BIA. On March 18, 2005, this Court found that "[w]e have jurisdiction over Lolong's petition pursuant to 8 U.S.C. § 1252(a)," granted the petition for review, and remanded for the Attorney General to exercise his discretion regarding asylum. *See Lolong v. Gonzales*, 400 F.3d 1215, 1218 (9th Cir. 2005). On June 27, 2005, respondent filed a petition for rehearing *en banc* challenging the Court's application of its "disfavored group" test for finding a well-founded fear of future persecution under 8 C.F.R. § 208.13(b)(2)(iii)(2000).

On October 4, 2005, the Court directed the parties to file simultaneous briefs addressing the three issues set forth above.

ARGUMENT

Respondent respectfully submits that the answer to the Court's first two questions is "no." Under *Molina-Camacho*, the Court does not have jurisdiction in this case. In light of the Real ID Act and *Molina-Camacho*, no remedy is available to Lolong in this Court. The answer to the first part of the Court's third question, however, is "no." The lack of judicial review over the merits of Lolong's asylum claim in either this Court or the district court *at this time* does not raise a constitutional problem. Nevertheless, the answer to the second part of the Court's third question is "yes" - the Court should revisit *en banc* its decision in *Molina-Camacho*. First, *Molina-Camacho* was wrongly decided and should be overturned. Second, the decision in *Lolong* to take jurisdiction over the case conflicts with the ruling in *Molina-Camacho*; rehearing *en banc* is therefore

necessary to restore uniformity in the Court's decisions. Third, *Molina-Camacho* presents a question of exceptional importance. Its ruling has interfered with the efficient and orderly operation of the administrative removal procedures and it will have a direct bearing on whether the Court can consider the merits of the government's rehearing petition in *Lolong*.

I. The Court Does Not Have Jurisdiction To Decide The Merits of This Case In Light Of *Molina-Camacho.*

The administrative procedural posture of *Lolong* is the same as in *Molina-Camacho*. Accordingly, unless the ruling in *Molina-Camacho* is overturned by the *en banc* Court, the ruling is binding and deprives the Court of jurisdiction in this case.

After being charged by the INS with being subject to removal as an alien present in the United States without having been inspected by an Immigration Officer, Molina-Camacho conceded that he was removable and applied for cancellation of removal. A.R. 488, 75-76.[1] The immigration judge found that "[b]ased upon the respondent's admissions, I find the respondent's removability has been by evidence which is clear and convincing." A.R. 62. The immigration judge did not expressly state that Molina-Camacho was ordered removed. He then granted cancellation of removal. A.R. 70. The INS appealed the grant of relief, but Molina-Camacho did not appeal the underlying finding of removability. A.R. 53-56. The BIA sustained the INS's appeal, found that Molina-Camacho failed to

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[1] "A.R." refers to the Certified Administrative Record in the relevant proceedings.

meet his burden of proving eligibility for cancellation relief, ordered him removed to Mexico, but granted voluntary departure. A.R. 2.

A panel of this Court ruled that the immigration judge did not enter an order of removal and that *Noriega-Lopez* "applies to invalidate the BIA's issuance of an order of removal in the first instance after reversing an IJ's grant of discretionary relief from removal." *Molina-Camacho*, 393 F.3d at 939 (citing *Noriega-Lopez*, 335 F.3d at 884 (holding that immigration judges, not the BIA, have the statutory authority to issue an order of removal in the first instance)). The panel found that the BIA acted *ultra vires*, and that the absence of a valid final removal order deprived it of jurisdiction under 8 U.S.C. § 1252(a)(1). The panel treated the petition for review as a petition for a writ of habeas corpus, and transferred the petition to the district court to review Molina-Camacho's challenge to the BIA's *ultra vires* removal order *Id.* at 940- 42 & n.4.[2]

The facts in *Lolong* place it in the same procedural posture as *Molina-Camacho*. Lolong was put in removal proceedings and charged with being subject to removal as an alien who failed to comply with the conditions of her nonimmigrant status in violation of 8 U.S.C. § 1227(a)(1)(C)(i). A.R. 1360. Lolong admitted the factual allegations of the Notice to Appear, conceded that she was removable as charged, and applied for asylum and other relief. A.R. 81-82.

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[2] Respondent filed a petition for panel rehearing and pointed out that 8 U.S.C. § 1101(a)(47) provides that the immigration judge's finding of removability is a removal order. The day before the rehearing petition was filed, the district court granted the habeas petition and remanded to the BIA on stipulation of the parties. The court of appeals dismissed the rehearing petition as moot.

The immigration judge found that "[b]ased on respondent's admissions and concession of removability, I find that removability has been established by clear and convincing evidence." A.R. 67. The immigration judge then determined that Lolong had a well-founded fear of future persecution in Indonesia and granted the application for asylum on that basis. A.R. 76. The INS appealed the decision of the immigration judge granting asylum to the BIA. A.R. 60-64. Lolong did not appeal the immigration judge's finding that she was removable to the BIA.

In May 2003, the BIA sustained the appeal of the INS, found that Lolong failed to meet her burden of establishing a well-founded fear of future persecution on account of a protected ground, and vacated the decision of the immigration judge. A.R. 2-3. The BIA granted Lolong voluntary departure, but ordered her removed to Indonesia "[i]n the event that the respondent fails to depart or comply with the conditions set forth below." A.R. 3. A single member of the BIA dissented without opinion from the reversal of the grant of asylum. *Ibid.*

Because *Lolong* falls squarely within *Molina-Camacho*, *Molina-Camacho* precludes this Court from exercising jurisdiction in *Lolong*, unless of course the revisits *Molina-Camacho en banc*, an action which we strongly urge the Court to take.

II. There Is No Remedy Available To Lolong In This Court In Light Of The Real ID Act And *Molina-Camacho*.

The *Molina-Camacho* panel reasoned that, because the immigration judge did not enter a removal order and the BIA could not enter one, the order entered by the BIA was *ultra vires* and a legal nullity. 393 F.3d at 941-42. The panel thus

concluded that there was no final removal order and that the Court lacked jurisdiction to review the BIA's decision. The panel determined, however, that the decision could be reviewed by the district court under 28 U.S.C. § 2241. The panel therefore transferred the case to the district court under 28 U.S.C. § 1631 to "ensure that Molina-Camacho has the opportunity to challenge the *ultra vires* removal order before the government seeks to remove him using it." *Id.* at 942. The panel noted that:

> [T]his decision will in no way inhibit full judicial review of Molina's claim regarding cancellation of removal. As in *Noriega-Lopez*, the district court should remand to the IJ for further proceedings. If the IJ issues a removal order, the normal course of appeal will bring the matter within our appellate jurisdiction, allowing Molina-Camacho to argue the merits of his claim to this court.

Ibid. n.4 (citation omitted). Thus, under *Molina-Camacho*, the *Lolong* panel was obligated to transfer her case to the district court, rather than decide the merits.

After the Real ID Act of 2005, the court of appeals can no longer transfer Lolong's case to the district court. Real ID has eliminated the jurisdiction of the district courts over removal orders and claims arising out of any action taken or proceeding brought to remove an alien. Specifically, section 106(a)(B) of the Real ID Act, Pub. L. No. 109–13, Div. B, 119 Stat. 231 (May 11, 2005), amends 8 U.S.C. § 1252 by adding a new subsection "(5) Exclusive Means Of Review," which provides that

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision . . . a petition for review filed with an appropriate court of appeals in accordance with this section

> shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act . . . ."[3]

This amendment was made effective upon the date of enactment (May 11, 2005) and "shall apply to cases in which the final administrative order of removal . . . was issued before, on, or after the date of enactment of this division." Section 106(b). Accordingly, district courts lack habeas jurisdiction to review the validity of the BIA's order in *Lolong*. *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 929 (9th Cir. 2005). Because Real ID confers exclusive jurisdiction over challenges to removal orders on the courts of appeals, and *Molina-Camacho* eliminated that jurisdiction in the circumstances presented, Lolong has no remedy in federal court at this time.

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[3] Section 106(a)(B) of Real ID also amended 8 U.S.C. § 1252(b)(9). That provision now reads as follows:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title [subsection] shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision . . . or by any other provision of law (statutory or nonstatutory) to review such an order or such questions of law or fact.

Because judicial review of "all questions of law and fact" arising from any action taken or proceeding brought to remove an alien is available only in judicial review of a final order under 8 U.S.C. § 1252, and because no court has habeas jurisdiction to review such orders, there is no habeas jurisdiction to review the BIA's decision in Lolong's case.

III. The Absence Of A Remedy In This Court Does Not Raise A Constitutional Problem.

The absence of a remedy in federal court *at this time* does not raise a constitutional problem for Lolong. Nevertheless, if the *en banc* Court were to revisit and overturn the decision in *Molina-Camacho*, as we urge it to do in the next section, there would be no reason to consider whether the absence of a remedy raises a constitutional problem.

There is no constitutional problem because, under *Molina-Camacho*, Lolong does not yet have a final removal order and a claim that is ripe for judicial review. Under the holding of *Molina-Camacho*, there is no final order of removal in this case because the BIA acted *ultra vires* in issuing an order of removal in the first instance after reversing the immigration judge's grant of relief, rather then remanding to the immigration judge to enter the order of removal. Lolong's claim thus lacks finality. In *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), the Supreme Court determined that:

> [t]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action. . . . Here there was no possible disruption of the administrative process; there was nothing else for the Commission to do. And certainly the Commission's action was expected to and did have legal consequences.

Id. at 71 (citations and footnotes omitted). *See also Assn. Of American Medical Colleges v. U.S.*, 217 F.3d 770, 780 (9th Cir. 2000)(holding that relevant considerations in making this evaluation include whether the action: is a "definitive statement of an agency's position"; has a "direct and immediate effect

on the complaining parties"; "has the status of law"; and "requires immediate compliance."); *Sierra Club v. United States Nuclear Regulatory Commission*, 862 F.2d 222, 225 (9th Cir. 1988)(finding agency orders to be final orders under the Hobbs Act "if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process."). Under *Molina-Camacho*, the BIA's *ultra vires* order did not require immediate compliance, impose an obligation, or deny a right: Lolong is able to remain in this country, and cannot be removed, until the immigration judge issues an order of removal which becomes a final order under either circumstance set forth in 8 U.S.C. § 1101(a)(47)(B). The Department of Homeland Security must wait for the entry of the final order to remove her. Once an order of removal becomes final, Lolong will be able to file a petition for review in this Court. Lolong's situation is no different from that of any other alien whose administrative proceedings have not concluded and who has not yet received a final removal order.

Under *Molina-Camacho,* the absence of a final removal order also means that Lolong does not yet have a claim that is ripe for judicial review. Requiring the completion of the administrative process before the alien can obtain a remedy in federal court does not raise a constitutional question. Ripeness is a justiciability doctrine designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387

U.S. 136, 148-49 (1967). Determining whether a claim is ripe for judicial review requires evaluation of both "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* at 149. Applying *Molina-Camacho*, the effects of the finding that she was removable have not been felt by Lolong in a concrete way because she does not face removal unless and until she is ordered removed. There is no hardship to Lolong in being able to remain in the United States pending issuance of an order of removal. Once her claim becomes ripe when an order of removal becomes final, Lolong can petition for judicial review like any other alien in her situation.

Accordingly, although no court has jurisdiction to hear her claim (*Molina-Camacho* precludes this Court's review, and the REAL ID Act eliminates district court review), no court needs to have jurisdiction until the agency issues a final removal order. As discussed more fully below, the mechanism to obtain such an order (assuming the Court declines to overturn *Molina-Camacho*) would be for the BIA to reopen proceedings and remand for entry of an order by the immigration judge. Indeed, a dismissal of her petition for review under the ruling of *Molina-Camacho* would establish the law of the case, and the BIA would be required to reopen and remand her case for entry of an order once the Court's mandate issued. After that order became final, she could file a petition for review and obtain judicial review. Because a remedy exists, no constitutional problem is presented in this case.[4]

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[4] Assuming for the sake of argument that there is a constitutional problem, which we submit there is not, "it is a 'cardinal principle' of statutory interpretation

Likewise, there will be no constitutional problem in any future case that falls within the decision in *Molina-Camacho*. In such a case, the alien could file a petition for review, which this Court would dismiss for want of jurisdiction under *Molina-Camacho*, holding that the alleged removal order is *ultra vires*.[5] The Court could make this determination because it has jurisdiction to assess its jurisdiction. *Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1208 (9th Cir. 2004). The BIA would then be required to reopen the case and remand for an entry of an order by the immigration judge, pursuant to the Court's mandate. Once that order became final, the petitioner could obtain judicial review by filing a second petition for review.

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that 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, [federal courts shall] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Oregon v. Ashcroft*, 368 F.3d 1118, 1125 (9th Cir. 2004)(brackets in original and citation omitted). The Court could avoid any constitutional problem by construing 8 U.S.C. § 1101(a)(47) in the manner urged by respondent as providing that an immigration judge's finding of removability is an order of removal which can become a final order of removal over which this Court has jurisdiction. In the following section, we explain why this construction is not plainly contrary to the intent of Congress and indeed is clearly consistent with the plain language of the statute.

[5] Alternately, of course, the Court could overturn the portion of *Molina-Camacho* holding that it lacks jurisdiction to review and vacate the order. 8 U.S.C. § 1252 grants jurisdiction to the courts of appeals to review a "final order of removal." Because the BIA entered what it purported to be a removal order, the Court had jurisdiction to review the order, and then vacate it and remand for appropriate agency proceedings if the Court thought that the order was *ultra vires*. As explained below, however, the order was not *ultra vires*.

Nevertheless, in answer to the second part of question number three, the *Lolong* panel *should not dismiss* the petition for review in this case for lack of jurisdiction. Instead, the Court should grant *en banc* rehearing and overturn *Molina-Camacho*, as we explain below, and then address the pending rehearing *en banc* challenge to the Court's "disfavored group" test in *Lolong*.

IV. The *En Banc* Court Should Revisit The Decision In *Molina-Camacho*.

Respondent urges the *en banc* Court to "revisit" and overturn the ruling in *Molina-Camacho* for three reasons. First, *Molina-Camacho* was incorrectly decided. The immigration judge found that Molina-Camacho was removable, and that finding was an order of removal within the plain and unambiguous language of 8 U.S.C. § 1101(a)(47)(A). There was nothing left for the agency to do. Second, the *Lolong* panel's decision to take jurisdiction conflicts with the ruling of *Molina-Camacho*. In *Molina-Camacho*, the Court ruled that it lacked jurisdiction because the immigration judge failed to state expressly that the alien was ordered removed. In *Lolong*, the Court took jurisdiction even though the immigration judge failed to state expressly that the alien was ordered removed. Third, *Molina-Camacho* presents a question of exceptional importance. It has led to time-consuming remands of many cases to the immigration judge for the express statement that the alien is ordered removed, and it has delayed the timely resolution of the removal process for many aliens. Its impact is particularly important to *Lolong* and related "disfavored group" asylum cases pending in this Circuit. As our *en banc* petition explains, the "disfavored group" ruling presents a

question of exceptional importance. The outcome of that petition will have an immediate impact on at least 80 cases that have been held in abeyance in the Court pending *Lolong*, and will dramatically influence this Court's review of future asylum cases. Finally, it is not necessary to "revisit" *Noriega-Lopez* as well in order to preserve this Court's jurisdiction in *Lolong*.[6]

A. The Panel Erred In Ruling That The Immigration Judge's Finding Of Removability Was Not An Order Of Removal.

The INA defines "order of deportation as follows:

> (A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, *concluding that the alien is deportable or* ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of -
>
> (i) a determination by the [BIA] affirming such order; or

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[6] The government continues to believe that *Noriega-Lopez* was wrongly decided, but submits that rehearing *en banc* in *Noriega-Lopez* is unnecessary. *Noriega-Lopez* presented a different issue than the one presented in either *Molina-Camacho* or *Lolong* because, contrary to both of these cases, the immigration judge determined that Noriega-Lopez's removability had not been established by clear and convincing evidence. The immigration judge terminated removal proceedings. Thus, the precise question in *Noriega-Lopez* was whether the BIA could order an alien removed where the immigration judge had neither found the alien removable nor ordered the alien removed. *Noriega-Lopez*, 335 F.3d at 877, 884. The panel in *Molina-Camacho* explicitly recognized this difference, noting that *Noriega-Lopez* "reserved 'for another day' whether [its] holding applies to 'situations in which an IJ determines that an alien is removable (whether based on a concession or after adjudication) but grants relief from removal, and the BIA then rejects the grant of relief.'" *Molina-Camacho*, 393 F.3d at 939 (quoting *Noriega-Lopez*, 335 F.3d at 884 n.10). Contrary to *Noriega-Lopez*, the precise question in *Molina-Camacho* was whether the term "order . . . concluding that the alien is deportable" under 8 U.S.C. § 1101(a)(47)(A) means that a finding of removability is an order of removal.

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the [BIA].

8 U.S.C. § 1101(a)(47)(Emphasis added).[7]

In considering whether a jurisdictional final removal order existed, the panel in *Molina-Camacho* misunderstood the plain meaning of the statute. The panel overlooked the fact that the statutory definition of "order of deportation" includes more than a decision "ordering deportation"; the definition also expressly includes a decision "concluding that the alien is deportable." In *Molina-Camacho*, the immigration judge unquestionably decided that the alien was removable. He stated that: "Based upon the respondent's admissions, I find the respondent's removability has been established by evidence which is clear and convincing." A.R. 62. Accordingly, he entered an order of removal within the meaning of 8 U.S.C. § 1101(a)(47).

The *Molina-Camacho* panel reached the wrong conclusion by asking the wrong question. Incorrectly assuming that the immigration judge did not enter a removal order, the panel framed the question as: May the BIA issue a removal order in the first instance? Because the immigration judge in fact entered a

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[7] The Court acknowledged that in this definition the term "special inquiry officer" includes an immigration judge and that "order of deportation" includes an order of removal. *Molina-Camacho*, 393 F.3d at 940. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Section 304, 110 Stat. 3009-587-97, significantly amended the INA by, among other things, eliminating the former distinction between deportation and exclusion of aliens from the United States and substituting, for proceedings initiated on or after April 1, 1997, a single proceeding to remove aliens from the United States.

removal order when he "conclud[ed] that the alien is deportable," the BIA did not enter a removal order in the first instance.

Furthermore, the panel compounded its error by improperly rejecting as "meaningless" the government's interpretation that a conclusion of deportability is an order of deportation. According to the panel:

> Accepting the Government's interpretation of the interplay between a finding of [deportability or] removability and an actual order of [deportation or] removal would render the IJ's discretionary ability to literally "cancel removal" meaningless, because a finding of removability in the first instance is a prerequisite to such discretionary relief.

Molina-Camacho, 393 F.3d at 941. This reasoning is not persuasive. First, the panel disregarded the plain language of section 1101(a)(47)(A), which states that a "conclu[sion] that an alien is deportable" *is* an order of deportation.[8] An interpretation that is based on the plain language of the statute is assuredly not "meaningless."

Indeed, the plain language of the statute makes sense in light of the statutory scheme read as a whole. The typical proceeding for removing an alien is a proceeding under INA section 240, 8 U.S.C. § 1229a. Under that provision, "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien. 8 U.S.C. § 1229a(a)(1). The immigration judge need not, however, conduct proceedings for deciding relief from removability, such as asylum. *See also Foti v. Immigration and Naturalization Service*, 375 U.S. 217,

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[8] Indeed, the net effect of the ruling in *Molina-Camacho* is to render the phrase "concluding that the alien is deportable" meaningless because the Court offered no interpretation of this provision.

229-30 & n. 16 (1963)(concluding that, under pre-IIRIRA statutes, questions of deportability had to be resolved in formal proceedings but that questions of relief did not). Because section 240 generally requires deportability decisions, but not relief decisions, to be made by an immigration judge, it makes sense that 8 U.S.C. § 1101(a)(47)(A) would also provide that immigration judges make only "conclu[sions] that the alien is deportable," and not conclusions regarding relief. Conclusions regarding relief can be made by the BIA, as in this case.

Second, it is not "meaningless" to say that an immigration judge can order removal and then cancel removal.[9] The panel appeared to believe that if the immigration judge states that an alien is ordered removed (in addition to stating that the alien is found removable), the immigration judge cannot then exercise his discretion to cancel the order of removal. But the panel did not explain how this would be so, and there is no legal impediment to an immigration judge canceling removal after ordering the alien removed (as opposed to after finding the alien removable). Indeed, it would appear logical to say that before removal can be cancelled, it first has to be ordered.

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[9] Indeed, the statutory definition has meaning outside cancellation of removal cases. *Lolong* is an example. Lolong applied for and was granted asylum by the immigration judge, not cancellation of removal. Absent a finding that she was removable as charged, consideration of asylum eligibility would have been unnecessary. It is not "meaningless" to say that an immigration judge can order removal, because the alien is removable, but then grant asylum as relief from that removal order.

Third, the statute takes into account the practicalities of immigration court proceedings. Usually, the "liability" question (is the alien removable?) is combined with the relief question (is the alien eligible for relief from removal?) into one proceeding culminating in a single question. *Foti*, 375 U.S. at 232 (1963)(holding "order of deportation" includes administrative decisions denying discretionary relief from deportation in the same proceeding). In such circumstances, the statutory equation of a "conclu[sion] that an alien is deportable" with an order of deportability is meaningful. It promotes efficiency and avoids the bane of delay and repetitious proceedings in the event the BIA reverses the grant of relief. *Molina-Camacho* provides a good example. Molina-Camacho conceded that he was removable as charged, and he applied for relief. The immigration judge found that he was removable and granted relief. The government appealed from the grant of relief but he did not cross-appeal the finding of removability. The BIA reversed the grant of relief and ordered him removed. By operation of the statute, the immigration judge had issued an order of removal that the BIA at the end of the case could turn into a final order. Under the statutory definition, this case does not have to be sent back for entry of a removal order, but is ready for judicial review. Indeed, but-for the panel's ruling in *Molina-Camacho*, there is nothing else for the agency to do. *See Port of Boston*

Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970). Thus, the statute eliminates needless delay and time-consuming agency proceedings.

B. Rehearing Is Necessary Because *Molina-Camacho* Presents Questions Of Exceptional Importance.

Moreover, *Molina-Camacho* should be reheard *en banc* because the issues it presents are exceptionally important. First, the decision has led to time-consuming remands of scores of cases to immigration judges, and it has delayed the timely resolution of the removal process for many aliens. While the government maintains that the Court based its ruling on a misinterpretation of 8 U.S.C. § 1101(a)(47), the government has nevertheless taken administrative action that has resulted in the reopening by the BIA of approximately 75 cases which appear to fit the *Molina-Camacho* profile. Under the screening mechanism implemented by the government, cases in which the BIA entered an order of removal in circumstances covered by *Molina-Camacho* are reopened by the BIA, either *sua sponte* or in response to a motion to remand filed by the government, and are remanded to an immigration judge for an express statement ordering the alien removed. These cases were pending before the Court, and had been briefed by the petitioner. The Court case was terminated upon administrative reopening.

Once an express statement ordering removal is entered, the alien will likely file a new petition for review and duplicate his or her previous efforts. In the meantime, the outcome of judicial review of the administrative final order has been delayed.

Second, the decision in *Molina-Camacho*, if allowed to stand, would preclude this Court from exercising jurisdiction in *Lolong* and thereby resolving the validity of the Court's "disfavored group" test. The "disfavored group" test usurps the exclusive delegated authority of the Attorney General to fill gaps in the asylum statute by promulgating regulations prescribing standards of eligibility which, under Supreme Court precedent, are entitled to "controlling weight." The "disfavored group" test has created a split among the circuits with two circuits rejecting the test's lower threshold of proof based on membership in a disfavored group. *See Firmansjah v. Gonzales*, 424 F.3d 598, 607 n.6 (7th Cir. 2005); *Lie v. Ashcroft*, 396 F.3d 530, 538 n.4 (3d Cir. 2005). There are also important pragmatic considerations that support timely consideration of the government's rehearing petition in *Lolong*. Since the filing of the government's petition on June 27, 2005, the Court has granted the government's motion to hold proceedings in abeyance pending consideration of the rehearing petition in approximately 80 other cases in which the petitioner has sought to apply the "disfavored group" test to ethnic Chinese Indonesians. Additionally, application of the "disfavored

group" test will dramatically impact the future adjudication and judicial review of asylum claims which are based on a well-founded fear of future persecution. The frequency with which the decision in *Lolong* is cited is a clear indication of the importance of resolving the issue of the validity of the "disfavored group" test.

C. Rehearing *En Banc* Is Necessary To Restore Uniformity In The Court's Decisions.

Finally, rehearing *en banc* is necessary to restore uniformity to the Court's decisions.[10] After *Molina-Camacho* was decided, the panel in *Lolong* took jurisdiction over an administrative order that was ultra vires under *Molina-Camacho*. Other cases in which the Court took jurisdiction in conflict with *Molina-Camacho* are: *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005); *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005); *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004); and *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004).[11]

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[10] No other courts of appeals have applied the reasoning of these two Ninth Circuit cases.

[11] On November 29, 2005, the government filed a petition for rehearing *en banc* in *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005). *Cordes* was affected by *Molina-Camacho* because the BIA ordered Cordes removed when the immigration judge had not done so; it then reopened proceedings *sua sponte*. This action underscores the problem which *Molina-Camacho* has caused: in *Cordes*, the *Molina-Camacho* problem was not identified while the case was before the panel of this Court.

Rehearing *en banc* in *Lolong* is further warranted to ensure uniformity in the Court's decisions, which have not applied the "disfavored group" test uniformly.

CONCLUSION

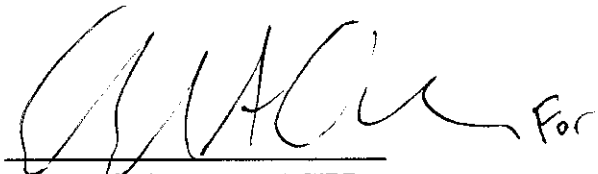
For the foregoing reasons, the panel of this Court should "ask an en banc court to revisit our decision[] in *Molina-Camacho* . . . ." The *en banc* Court should overturn the ruling in *Molina-Camacho*, and exercise its jurisdiction in *Lolong* to consider the pending petition for rehearing *en banc*.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JONATHAN F. COHN
Deputy Assistant Attorney General

DONALD E. KEENER
Deputy Director
Office of Immigration Litigation



FRANCIS W. FRASER
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0193

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